Supreme Court, U.S.
FILED

No. 961524 MAR 20 1997

OFFICE OF THE CLERK

In The Supreme Court Of The United States

October Term, 1996

Gettys Glaze, et al.,

Respondents,

v.

Jack Grooms, et al.,

Petitioners

On Petition for a Writ of *Certiorari* to the Supreme Court of the State of South Carolina

PETITION FOR WRIT OF CERTIORARI

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58 pp

Question Presented

The South Carolina Secretary of State chartered a town and the South Carolina Supreme Court made it operational by ordering an election for Mayor and Town Council. Does the State have unfettered discretion to nullify, by a retroactively applied judicial decision, that Town's incorporation when to do so impairs contractual obligations of the Town, acquired through three years of operation after the State Supreme Court ordered the election of officers?

Gettys Glaze, Robert B. Kizer, Catherine E. White, and the City of Charleston, a Municipal Corporation,

Respondents,

v.

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, James Miles, in his capacity as Secretary of State for the State of South Carolina, and the Town of James Island,

Petitioners,

Of whom:

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, and the purported Town of James Island,

Are Petitioners.

Table of Contents

Page

Questions Presented i

Table of Authorities 3

Opinions Below 5

Jurisdiction 6

Constitutional and Statutory Provisions Involved 8

Statement of the Case 9

Reasons to Grant the Petition

South Carolina denies Due Process and violates the Contracts Clause when it authorizes an election which leads to formation of a Town then four years later nullifies that popular election by judicial decision applying retroactively a new interpretation of the state's incorporation statute, impairing years of contractual commitments with no compelling state interest..... 14

Conclusion..... 23

Appendices

A. The opinion sought to be reviewed 24

B. Motion for Stay 44

C. Memorandum in Support of Motion for Stay 45

D. Order on motion for stay 51

E. Order on petition for rehearing 53

Table of Authorities

Cases **Pages**

Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978) 17, 18, 22

Bouie v. City of Columbia, 378 U.S. 347 (1964)..... 17, 22

Glaze v. Grooms, 478 S.E.2d 841 (1996)..... 6, 6, 13, 20

Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960)..... 17, 21, 22

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) 17

Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961) ... 21

Constitution and Statutes

U.S. Const. Art. I, Sec. 10 ... 8

U.S. Const. Amend. I 8

28 U.S.C. § 1257(a) 6

S.C. Code § 5-1-40 (1976)... 8, 11, 19

S.C. Code § 5-1-90 (1976)..... 12

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1996

Gettys Glaze, Robert B. Kizer, Catherine E. White, and the City of Charleston, a Municipal Corporation,

Respondents,

v.

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, James Miles, in his capacity as Secretary of State for the State of South Carolina, and the Town of James Island,

Petitioners

Petition for a Writ of *certiorari*
to the Supreme Court of the
State of South Carolina

Petitioners Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, and on behalf of the purported Town of James Island, respectfully petition for a writ of *certiorari* to review a judgment of the Supreme Court of South Carolina.

Opinions Below

The opinion of the South Carolina Supreme Court is reported as *Glaze v. Grooms*, 478 S.E.2d 841(S.C. 1996).

Jurisdiction

This appeal concerns an opinion issued November 18, 1996, by the South Carolina Supreme Court, *Glaze v. Grooms*, 478 S.E.2d 841 (S.C. 1996). A Petition for Rehearing and a Motion for a Stay were timely filed and denied on December 20, 1996. Id.. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), in that the court of last resort in South Carolina has rendered a final judgment respecting the federally protected interest in contracts unimpaired by State action, particularly those contracts which are the direct product of cherished First Amendment voting and speech rights. Those federal questions are substantial and were

necessarily decided in the state proceedings.

The complaint sought, *inter alia*, to nullify the results of a municipal incorporation election and to enjoin the election of municipal officers (Mayor and Council). Under state law, once the election for officers was held the municipality's certificate of incorporation was activated.

The Town raised the defense, among others, that granting the relief violated due process and that the town's operations and contracts would be impaired. No adequate nonfederal grounds support the state court ruling on these issues.

Constitutional and Statutory Provisions Involved

Art. I, Sec. 10 of the United States Constitution provides, in pertinent part:

> No State shall pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts. . . .

The First Amendment provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The South Carolina incorporation statute

at issue, S.C. Code § 5-1-40 (1976), provides:

> Except as otherwise provided by law, the citizens of any proposed municipality in this State, desiring to be incorporated, shall file with the Secretary of State their petition for that purpose, setting out the corporate limits proposed for the municipality and the number of inhabitants therein and signed by fifty qualified electors thereof and fifteen percent of the freeholders who reside within the proposed municipality.

Statement of the Case

This is a case about municipal self-

determination. It challenges on Constitutional grounds South Carolina's applying, retroactively, a new interpretation of its incorporation statute. That interpretation voided an election which the South Carolina Supreme Court had previously sanctioned by grant of *supersedeas*. The lower court had enjoined the election, and the *supersedeas* permitted it to proceed.

The results of that election were not appealed, but four years later the election was nullified by the state's retroactive application of its newly implied incorporation requirements.

In June, 1992, qualified persons residing in certain unincorporated portions of Charleston County filed with

the Secretary of State a petition pursuant to S.C.Code Ann. §5-1-40 (1976) to incorporate a municipality from various land areas on a coastal island. The town was to be known as the Town of James Island. Upon receiving the petition, and pursuant to state law, the Secretary of State commissioned Petitioners to organize an election to gauge the will of the voters. The voters approved the incorporation. The result was certified by the managers of the election, and no appeal was taken from that certification.

Once incorporation was approved by the voters, another election, to fill the Mayor and Council seats, was scheduled for March, 1993, and the Secretary of

State issued a charter to the Town of James Island.

State law provides that once the election for officers is held the new municipality can exercise it powers. Respondents filed this suit seeking to enjoin that Mayoral and Council election, and to set aside the initial, unappealed election to incorporate.

A preliminary injunction was granted to halt the election for Mayor and Council members, but the Chief Justice of the South Carolina Supreme Court granted *supersedeas*, allowing the election to be held, as scheduled and as the Secretary of State requested.

The officers were elected. Pursuant to S.C.Code §5-1-90 (1976), the Town of

James Island came into existence as an incorporated municipality and commenced operations.

After trial on the merits the trial court nullified the incorporation because it determined that contiguity of land areas, while not required by the text of the incorporation statute, was an implied requirement. The court then defined contiguity in such a way that the areas making up the Town of James Island could not satisfy contiguity because the navigable waterways and marsh areas which separated the land areas of the Town had been previously "annexed" by, 478 S.E.2d at 744, and were "owned" by, 478 S.E.2d at 845, the City of Charleston. For that reason, the trial court concluded those

waterways could not be crossed by the Town of James Island to create contiguity among its constituent land parcels. In other words, the Court concluded that any crossing of a waterway necessarily occupied the entire waterway.

The trial court stayed its own order pending appeal. The South Carolina Supreme Court affirmed. Petitions for rehearing and a motion to stay were denied in December, 1996. This petition followed.

Reasons to Grant the Petition

South Carolina denies Due Process and violates the Contracts Clause when it authorizes an election which leads to formation of a Town then four years later nullifies that popular election by judicial decision applying retroactively a

new interpretation of the state's incorporation statute, impairing years of contractual commitments with no compelling state interest.

This is a case about the fundamental right of self determination and the impairment of contracts. There is no dispute that the voters of James Island petitioned to incorporate, and, at a popular election, voted to incorporate. They did so under a statute that set forth plainly certain requirements. There is no dispute that the Secretary of State issued a charter, or that Town officers were elected, installed, and administered the business of the Town for more than three years. In fact, the officers last serving were those elected in the Town's second municipal elections.

The results of neither of those elections were appealed.

South Carolina has nullified all of these elections by interpreting the state incorporation statute to include a contiguity requirement not stated in the statute,[1] and in interpreting that requirement in such a way that navigable waterways and wetlands, which typically are not barriers to contiguity of land areas, serve as barriers if another municipality (in this case, the City of Charleston) had previously crossed over that waterway, at some point, to annex

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[1] As set forth in considerable detail in the proceedings below, there are at least sixty-four other references to contiguity in the South Carolina Constitution and Code. The legislature is not hesitant to explicitly require contiguity.

other property.

The State generally has authority to interpret the incorporation statutes and define the criteria applicable to incorporation. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). That general authority is not unlimited. E.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), explicitly holds that *Hunter* is restrained by the Constitution. *See also, Allied Structural Steel Company v. Spannus*, 438 U.S. 234 (1978) (Contracts Clause limits state's authority to act retroactively); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (Due Process limits state's authority to act retroactively). To act retroactively and affect a fundamental right such as

contracts is permissible only if a compelling state interest is present.

Petitioners complied with the statute as written. Four years later, the state changed retroactively the statutory requirements for incorporation, and in so doing impaired, without a compelling state interest the right of freedom of contract. Under *Allied Steel*, 438 U.S. 234, 247 (1978), such actions are permissible only if the state shows the imposition is "necessary to meet an important general social problem."

South Carolina has no compelling state interest for infringing Petitioner's contract and franchise interests. Indeed, in the courts below the executive branch of South Carolina,

in the form of the Secretary of State, argued in support of Petitioners' right to incorporate. Petitioners had a right to rely on the Secretary of State's interpretation of the incorporation requirements, and on the Secretary of State's advocacy in support of the Petitioners.

The best indicator of the unexpectedness of the State's retroactive interpretation is that the Secretary of State joined Petitioners in the argument below, not only in the trial court, but also on appeal to the State Supreme Court.

The statute itself makes no reference to contiguity. S.C. Code § 5-1-40 (1976)states:

> Except as otherwise provided by law, the citizens of any proposed municipality in this State, desiring to be incorporated, shall file with the Secretary of State their petition for that purpose, setting out the corporate limits proposed for the municipality and the number of inhabitants therein and signed by fifty qualified electors thereof and fifteen percent of the freeholders who reside within the proposed municipality.

The South Carolina Supreme Court contended, 478 S.E.2d 841, 843 n.4 (S.C. 1996), "we have previously recognized a contiguity requirement even in the absence of a statutory mandate to that

effect. Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961)." *Glaze* at 478 S.E.2d at 843, n.4 (1996). The *Tovey* case did not involve the incorporation statute, and is no notice to Petitioners that incorporation requires contiguity, particularly when the Secretary of State supported Petitioners' interpretation.

The Constitutional manner for the state to create "implied" conditions for incorporation when those conditions infringe on Constitutional grounds is to apply such requirements only prospectively. South Carolina having permitted the municipality to elect officers, and thereby to become empowered, the state could not

retroactively abridge those rights.

In *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960), this Court held that "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." The reach of the federal rights protected by *Gomillion* from retroactive state action is at issue in this petition. Granting the petition will determine how the rationales of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *Allied Structural Steel Company v. Spannus*, 438 U.S. 234 (1978), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), extend to retroactive state action.

Conclusion

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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Appendix A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Gettys M. Glaze, Robert B. Kizer, Catherine E. White and the City of Charleston, a Municipal Corporation,

Respondents,

v.

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, James Miles, in his capacity as Secretary of State for the State of South Carolina and the Town of James Island,

Appellants.

Appeal from Charleston County

A. Victor Rawl, Judge
John C. Hayes, III, Judge

Opinion No. 24529
Heard September 19, 1996 - Filed November 18, 1996

AFFIRMED

J. Reese Daniel, of Columbia, Melinda A. Lucka, of James Island and J. Christian Adams, General Counsel for the South Carolina Secretary of State, of Columbia, for Appellant.

Frances I. Cantwell and William B. Regan, of Charleston, for Respondent.

WALLER, A.J.: This case involves a challenge to the 1992 incorporation of the Town of James Island. The circuit

court ruled the incorporation invalid due to a lack of contiguity of the areas incorporated. We affirm.

FACTS

In June, 1992, certain residents of the unincorporated areas of James Island petitioned the Secretary of State seeking to incorporate into a municipality. The Secretary issued a commission to four individuals (the Appellants, Election Commissioners) to conduct a referendum. The December 1. 1992 referendum resulted in favor of incorporation (2287 in favor, 2212 against). On December 17, 1992, the plaintiffs instituted the present action against the Election Commissioners

challenging the incorporation.[1] They sought declaratory relief and injunction. They claimed, inter alia, the areas of James Island incorporated laced the requisite contiguity.[2]

In June, 1993, the election commissioners filed a motion for judgment on the pleadings claiming the plaintiffs

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[1] The Secretary of State issued a certificate of incorporation to the Town three weeks later, on January 8, 1993.

[2] They also alleged the incorporation statute, S.C. Code Ann. § 5-1-40 (1976), was unconstitutional as it denied equal protection and that the residents had failed, as required by S.C. Code Ann. § 5-1-30 (Supp. 1995), to request annexation by the nearest municipality. Neither of these issues were addressed by the circuit court and, accordingly, they were not preserved for review. Cook v. SCDHPT, 309 S.C. 179, 420 S.E.2d 847 (1992).

had failed to name the proper parties in their complaint,[3] and that the present action had not been timely instituted. After a hearing, the circuit court denied the motion for judgment on the pleadings but on its own motion, pursuant to rule 21, SCRCP, ordered the Secretary of State and the Town of James Island be added as defendants.

A hearing on the merits was held in July, 1995. The circuit court held, inter alia, 1) Town lacked the requisite contiguity to incorporate, 2) the plaintiffs' action was timely filed, and 3) the town was not a de facto municipality.

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[3] They claimed the plaintiffs should have named the Secretary of State.

ISSUES

1. Did the Court err in finding that the Town lacked the requisite contiguity?

2. Was the action properly/timely instituted under S.C. Code Ann. § 5-1-110 (1976)?

3. Do respondents Glaze and City of Charleston have standing?

4. Did the Court err in finding Town was not a de facto municipal corporation?

1. CONTIGUITY

Appellants contend the circuit court erred in finding the Town without the requisite contiguity.[4] We disagree.

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[4] Initially, appellants assert nothing in § 5-1-10 et seq. requires incorporating areas to be contiguous. Contrary to appellant's assertion, territory sought to be incorporated must

It is essentially undisputed that there are nine "high land" areas of James Island, separated by marshlands and creeks which have previously been annexed by the City of Charleston and/or the City of Folly Beach. James Island used these marshlands and creeks to establish contiguity, claiming that since the "high lands" are otherwise contiguous, the fact that they are separated by water does not vitiate their contiguity.

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be contiguous. McQuillen, Municipal Corporations, § 3.15(f) - See also 1983 Op. Atty. Gen. 83-63 (contiguity requirement applies to incorporations as well as annexations). Further, we have previously recognized a contiguity requirement even in the absence of a statutory mandate to that effect. Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961). We find the circuit court correctly held contiguity is required for incorporation.

We agree with Appellants' basic proposition that contiguity is not destroyed by water or marshlands which separate parcels of highland. See, e.g., Tovey v. City of Charleston, 237 S.C. 475, 117 S.E.2d 872 (1961); Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). However, the flaw in Appellants' argument is that it essentially disregards the fact that the waters' wetlands it seeks to use to establish contiguity have already been annexed by another municipality.[5]

In Tovey, we recognized that marshlands or wetlands, even if owned by

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[5] But for the previous annexations of the areas in question, we would agree that James Island met the requisite contiguity.

the State,[6] may be annexed by a municipality. Here, the City of Charleston and the City of Folly Beach had, prior to James Island's proposed incorporation, annexed the waters in question. Accordingly, once annexed by those municipalities, the territory became like any other annexed territory, i.e., it fell within that municipality's boundaries. It is implicit that contiguity must be achieved through adjacent parcels which are not within the corporate limits of another municipality.

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[6] Appellants also claim, citing Coburg v. Lesser, ___ S.C. ___, 458 S.E.2d 547 (1995), that respondent have failed to prove ownership of the wetlands. Tovey makes clear, however, that ownership is not required before a municipality may annex state owned property and wetlands.

Tovey supra; Town of Forest Acres v. Siegler, 224 S.C. 166, 77 S.E.2d 900 (1953). See also 62 C.J.S. Municipal Corporations § 85 (generally, a new municipality cannot be formed out of or embrace territory already included with the limits of an incorporated city). It defies the very concept of contiguity to suggest that one municipality may use an adjacent municipality's annexed territory to establish contiguity. Accordingly, the circuit court properly ruled, due to the prior annexation of the waters in question, that Town lacked the requisite contiguity to incorporate.

2. TIMELINESS

Appellants claim this action,

instituted three weeks prior to the issuance of the certificate of incorporation, was untimely as S.C. Code Ann. § 5-1-110 requires challenges to be instituted "within 60 days after issuance of the certificate." We disagree.[7]

If an action is required by statute within a certain time "after" an event, the general rule is that the action may be taken before the event, since the statute will be considered as fixing the

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[7] To the extent Appellants contend the action raises no procedural challenge, there in nothing for the Court's review as appellants never raised this contention below. McGee v. Bruce Hosp. System., _____ S.C. _____, 468 S.E.2d 633 (1996). Further, contrary to Appellant's contention, such a defect would not deprive the circuit court of subject matter jurisdiction. See Dove v. Goldkist, 314 S.C. 235, 442 S.E.2d 598 (1994); Moyd v. Johnson, 289 S.C. 342, 347 S.E.2d 97 (1986).

latest, but not the earliest, time for taking the action. 86 C.J.S. Time § 8, See also Kanavos v. Hancock Bank & Trust, 493 N.E.2d 311 (1982). When used relative to time "within" means "any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than." BLACK'S LAW DICTIONARY 1437 (5th Ed. 1979). Consistent with this approach, the trial court found the action timely commenced. We concur with the trial court's ruling.

The Election Commissioners also assert they were not property named as defendants. We disagree.

A motion to dismiss a party is addressed to the court's discretion. A.J. Moore, J. Lucas, and G. Grotheer,

Moore's Federal Practice Section 21.03[1] (2d ed. 1987); Demian v. SCH&HFSC, 297 S.C. 1, 374 S.E.2d 510 (Ct. App. 1988). Section 5-1-110 authorizes a suit to challenge the incorporation procedures of a municipal corporation. The election Commissioners were the people who instituted the proceedings necessary to incorporate and who forwarded to the Secretary of State the maps (which did not reveal a lack of contiguity) outlining the proposed area of James Island. As such, we find they were properly named as parties.

Further, the trial court properly declined to dismiss the suit in favor of adding the Secretary of State and Town as defendants. See Rule 19, SCRCP (joinder

of necessary parties) and Rule 21, SCRCP (misjoinder of parties not a ground for dismissal; parties may be added on motion of the court as any stage of the action).

3. STANDING

Appellants next assert respondents Glaze and the City of Charleston have no standing to bring this action. We disagree.

To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. Townsend v. Townsend, (Op. No. 24484 (S.C. Supreme Court filed August 19, 1996) (Davis Adv. Sh. No. 28 at 18). A real party in interest is one with a real material or substantial

interest. Anchor Point, Inc. V. Shoal's Sewer Co., 308 S.C. 423, 418 S.E.2d 546 (1992); Rule 17 SCRCP. The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing. City of Spartanburg v. County of Spartanburg, 303 S.C. 393, 401 S.E.2d 158 (1991).

We find Glaze's status as a resident of James Island is sufficient to confer standing. Cf. Saint Andrews Public Service District v. City of Charleston, 294 S.C. 92, 362 S.E.2d 877 (1987) (annexation statute grants standing to any resident of any area to challenge a proposed annexation). Similarly, the City of Charleston, which owns the

territory Town seeks to use to establish contiguity, claims a sufficient infringement of its interest to confer standing.

Finally, we reject Appellants' contention that this action may be brought only by the State. Although the legal existence of a municipal corporation, once formed, is generally reserved to the State, a material omission in the acts necessary in the process of incorporation may be collaterally attacked. McQuillen, Municipal Corporations, § 3.49 (1987). Here, section 5-1-110 specifically authorizes a challenge to incorporation procedures without designation who may bring such a suit. In the absence of a

specific limitation by the Legislature, we decline to limit such challenges to the State.

4. DE FACTO CORPORATION

Lastly, appellants assert Town, having assumed all the duties and powers of a municipality, is a de facto municipality and is there fore not subject to attack. We disagree.

A de facto corporation is one so defectively created as not to be a de jure corporation, but nevertheless the result of a bona fide attempt to incorporate undo existing statutory authority, coupled with the exercise of corporate powers, and recognized by the courts as such in all proceedings except

a direct attack by the state questioning its corporate existence. McQuillen, infra, § 3.48. If, however, there is a material omission or fatal irregularity in the proceeding for the incorporation, a purported decree is void and does not create a de facto corporation. Id. at § 3.48(a). S.C. Code Ann. § 5-1-110 specifically authorizes such a challenge.

Here, the plaintiffs claimed a fatal irregularity in the incorporation proceeding, i.e., lack of contiguity. We find the challenge was both timely and proper and, accordingly, we decline to confer the status of a de facto municipality simply due to the length of the appeal. Accord Dalton v. Town Council of Mt. Pleasant, 241 S.C. 546,

129 S.E.2d 523 (1963) (refusal to uphold de facto existence where plaintiff had acted promptly in contesting annexation and sought, and been denied, an injunction pending the litigation)."[8]

The judgment below is

AFFIRMED.

TOAL, MOORE, BURNETT, JJ., and Acting Associate-Justice H. Samuel Stilwell, concur.

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[8] Moreover, it is quite evident from the record that Town attempted, from the outset, to establish itself as a de facto corporate entity, notwithstanding the pending challenge to its incorporation. Minutes of Town Meeting, March 3, 1993.

Appendix B

The State of South Carolina

In The Supreme Court

Gettys Glaze, Robert B. Kizer, Catherine E. White, and the City of Charleston, a Municipal Corporation,

Respondents

v.

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, James Miles, in his capacity as Secretary of State for the State of South Carolina, and the Town of James Island,

Appellants

Appeal from Charleston County
A. Victor Rawl, Judge
John C. Hayes, III, Judge

Motion for a Stay

Appellants move the Court to stay (a) proceedings on this action or (b) issuance of the remittitur, pending a hearing in the United States District Court related to an action *(anticipated to be)* filed by the Town of James Island and certain of its individual citizens, pursuant to SCACR 220(b) and 224, on the grounds set forth more fully in the attached memorandum.

Melinda Lucka
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Appendix C

The State of South Carolina
In The Supreme Court

Gettys Glaze, Robert B. Kizer, Catherine E. White, and the City of Charleston, a Municipal Corporation,

Respondents

v.

Jack Grooms, Elizabeth Green, Pamela Ohlandt, William Wilder and George Bloodworth, in their official capacities as Commissioners of Election for the Proposed Town of James Island, and in their official capacities as managers of Election for the proposed Town of James Island, James Miles, in his capacity as Secretary of State for the State of South Carolina, and the Town of James Island,

Appellants

Appeal from Charleston County
A. Victor Rawl, Judge
John C. Hayes, III, Judge

Memorandum in Support of
Motion for a Stay

In this motion, references to the "City" refer to the Respondent City of Charleston, and the Appellants are collectively referred to as the "Town."

The Town requests the Court stay its proceedings or, in the alternative, stay issuance of the remittitur in light of an action anticipated to be filed in the United State District Court for the District of South Carolina. That action is anticipated to be filed Wednesday, December 18, 1996.

The nature of the action is to challenge the incorporation statute, S.C. Code §§ 5-1-10 et seq., as interpreted and applied by the Secretary of State to James Island, in light of constitutional, contract, and voting

rights infringed by that interpretation and application. Named as plaintiffs are various minority and other citizens of the Town of James Island, alleging infringements of various individual rights. Named as defendants in that litigation are the Secretary of State of South Carolina. The action seeks to enjoin the Secretary of State from applying that ruling if and when it issues from the Supreme Court.

The plaintiffs include various individuals who reasonably relied on the Town's 1992 incorporation and various court orders permitting it to operate pending litigation and appeal, and whose contract, civil, voting, and other political rights, including

constitutional rights, have been unduly intruded upon and burdened by the State of South Carolina, acting under color of state law and without a compelling or substantial state interest upon which to justify infringing those rights.

Specifically, the rights alleged to have been infringed are the rights protected by the United States Constitution, Art. I Sec. 10 (the Contract Clause and the Right of Franchise); the First, Fourteenth, and Fifteenth Amendments to that Constitution (freedoms of association and assembly; takings without just compensation); and the Voting Rights Act, including 42 U.S.C. § 1973(c) and 1973(h). The litigation contends that

no substantial or compelling state interest is present in interpreting into the incorporation statute a contiguity requirement and in applying that requirement to the Town of James Island. The elections overturned by this process, and the contractual implications for those who dealt in good faith with the Town on matters such as zoning, both before and after the trial court's ruling, are significant. The impacts from those decisions are set forth more fully in the enclosed affidavit from Mayor Sooy attached to this memorandum.

Conclusion

For the reasons set forth above,

the Appellants request the Court stay its action in this litigation, or at minimum stay the remittitur from being issued to the circuit court.

Respectfully submitted,

/s/
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Appendix D

THE SUPREME COURT OF SOUTH CAROLINA

December 20, 1996

Melinda A. Lucka, Esquire
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James Island, SC 29422

Re: Glaze v. Grooms

Dear Ms. Lucka:

The following Order has been endorsed on your Motion to a Stay in the above entitled case on appeal.

"Motion for a Stay is denied.

s/Jean Toal, A.C.J.
For the Court

Chief Justice Ernest A. Finney, Jr. not participating

December 20, 1996"

By copy of this letter we are advising all interested parties of this action.

Very truly yours,

s/ Clyde N. Davis

Clerk of Court

Appendix E

THE SUPREME COURT OF SOUTH CAROLINA

December 20, 1996

Melinda A. Lucka, Esquire
P O Box 12240
James Island, SC 29422

Re: Glaze v. Grooms

Dear Ms. Lucka:

The following Order has been endorsed on your Petition for Rehearing in the above entitled case on appeal.

"Petition for Rehearing is denied.

s/Jean Toal, A.C.J.

s/ James E. Moore A.J

s/ John H. Waller, Jr. A.J.

s/ E.C. Burnett, III A.J.

Chief Justice Ernest A. Finney, Jr. not participating

December 20, 1996"

The remittitur in this matter is today being forwarded to the Clerk of Court of Charleston County.

Very truly yours,

s/ Clyde N. Davis

Clerk of Court

(2)

Supreme Court, U.S.
FILED
APR 24 1997
CLERK

No. 96-1524

In The

Supreme Court of the United States

October Term, 1996

JACK GROOMS, *et al.*,

Petitioners,

vs.

GETTYS GLAZE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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21

RESTATEMENT OF QUESTION PRESENTED

Does the South Carolina judiciary have the authority to nullify a municipal charter when the charter was issued in contravention of law?

LIST OF INTERESTED PARTIES

The Respondents Gettys Glaze, Robert B. Kizer, Catherine E. White and the City of Charleston, a Municipal Corporation, join in this brief in opposition to the Petition. Robert G. Clawson, Jr., is counsel of record for these Respondents.

TABLE OF CONTENTS

	Page
Restatement of Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Constitutional Provisions, Statutes and Rules Involved	1
Statement of the Case	1
A. Course Of Proceedings And Disposition Of The Case Below.	2
B. Correction Of Misstatements In Petition.	3
Summary of Argument	4
Reasons for Denying the Writ	5
I. This Court Has No Jurisdiction To Consider Petitioners' Arguments.	5
II. The Ruling Of The South Carolina Supreme Court Has Impaired No Contracts Nor Violated Any Principles Of Due Process.	8

Contents

Page

III. The State Of South Carolina Has A Compelling Interest In How Its Political Subdivisions Are Formed. 11

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 10

Bouie v. City of Columbia, 378 U.S. 347 (1964) 10

Fleming v. Fleming, 264 U.S. 29 (1924) 7

Glaze v. Grooms, 478 S.E. 2d 841 (S.C. 1996) 3

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 10

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 7, 9, 11

Ross v. Oregon, 227 U.S. 150 (1913) 6

Schofield v. Richland County, School District, 316 S.C. 78, 447 S.E. 2d 189 (1994) 5

Tidal Oil Company, et al. v. Flanagan, 263 U.S. 444 (1924) 7

Contents

	Page
Tovey v. City of Charleston, 237 S.C. 475, 117 S.E. 2d 872 (1961)	7, 11
Town of Forest Acres v. Siegler, 224 S.C. 166, 77 S.E. 2d 900 (1953)	7
Walker v. Bennett, 118 S.E. 779 (1923)	8
Yee v. Escondiado, 503 U.S. 519 (1992)	5
Statutes Cited:	
28 U.S.C. § 1257(a)	1
S.C. Code Ann., Sec. 5-1-110	1, 2, 3
S.C. Code Ann., Sec. 5-15-130	1, 3
United States Constitution Cited:	
Article I, Sec. 10	1, 4, 6, 7, 10
Fourteenth Amendment	11
Rules Cited:	
Supreme Court Rule 14	1, 6
Supreme Court Rule 14(g)(i)	6
South Carolina Rule of Civil Procedure 15	1, 6
South Carolina Rule of Civil Procedure 59(e)	1, 3, 6

Contents

Page

APPENDIX

Appendix A — Relevant Constitutional Provisions, Statutes and Rules 1a

STATEMENT OF JURISDICTION

Respectfully, this Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a), because the questions now posed by Petitioners were not presented to the South Carolina courts. New questions cannot now be considered.

Reliance on Article 1, Sec. 10 of the United States Constitution is misplaced. This case concerns the judicial construction of a state statute. It does not involve the enactment of legislation.

These Petitioners lack standing to prosecute the issues they attempt to raise.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Unitd States Constitution, Art. I, Sec. 10

S.C. Code Ann., Sec. 5-1-110

S.C. Code Ann., Sec. 5-15-130

Supreme Court Rule 14

Rule 15, South Carolina Rules of Civil Procedure

Rule 59(e), South Carolina Rules of Civil Procedure

STATEMENT OF CASE

Respondents respectfully oppose the Petition of Certiorari.

A. Course Of Proceedings And Disposition Of The Case Below.

This case concerns an attempt to form a municipality under the laws of South Carolina. The incorporation effort was challenged by the Respondents on the ground that the proposed town was not geographically contiguous as required by state law.

The area sought to be incorporated consisted of nine (9) separate and distinct parcels of land surrounded by areas of water, marsh or lowland within the corporate limits of the cities of Charleston and Folly Beach, South Carolina.

The Respondents commenced an action challenging the incorporation effort pursuant to S.C. Code Ann., Sec. 5-1-110. The contest to the incorporation was pending, and duly noticed to the Petitioners, prior to the issuance of any charter, prior to any election of municipal officers, prior to the activation of any municipal charter, prior to the exercise of any franchise rights under the auspicious of the town and prior to any contracts being awarded by the town.

The Respondents' effort to enjoin the election of municipal officers, and the activation of the charter of the town upon their election, pending a merits hearing was unsuccessful, as the South Carolina Supreme Court superseded a temporary injunction issued by the trial court.

After a hearing on the merits, the trial court, on September 28, 1995, ruled the town a nullity, declaring it lacked geographical contiguity required by state law. The trial court enjoined the town from operating as a municipality and issued a limited stay of injunction pending appeal, conditioned on the town taking only such action in the normal course and scope of

that required for its safe and efficient operation. Petitioners did not move to alter or amend the ruling of the trial court pursuant to Rule 59(e) SCRCP. The Petitioners' attempt to supersede the limited stay of injunction pending appeal was denied by the South Carolina Supreme Court. On November 18, 1996, the South Carolina Supreme Court affirmed the ruling of the trial court. *Glaze v. Grooms*, 478 S.E. 2d 841 (S.C. 1996). Post appeal, the Petitioners' motions for a rehearing, a remand, and a stay were denied, on December 20, 1996. The Petitioners did not request a stay to allow them to petition the United States Supreme Court for a writ of certiorari.

The town having been declared a nullity, its geographic area reverted to an unincorporated status, under the jurisdiction of Charleston County, South Carolina. The Comptroller of Charleston County has been appointed Receiver for the town, with power to continue to completion contracts for public improvements or other town obligations. The Receiver is now formulating a plan, for court approval, to wind up the affairs of the town.

B. Correction Of Misstatements In Petition.

Throughout their Statement of the Case, the Petitioners make reference to the conduct of elections, which were not appealed. These references are true, but are irrelevant and misleading. A contest to an election in South Carolina is directed to the manner in which the election was conducted and can only be brought by a candidate. S.C. Code Ann., Sec. 5-15-130. S.C. Code Ann., Sec. 5-1-110 mandates the procedure in which an incorporation must be challenged, a procedure the Respondents followed.

The Petitioners argue that the state court concluded that "any crossing of a waterway necessarily occupied the entire

waterway". (Petition, p. 14). This is not so. Uncontroverted evidence was introduced at trial that every inch of water, marsh and lowland lying between the nine (9) separated areas of the town were included within the corporate limits of other municipalities.[1]

The trial court did not stay its order pending appeal. The trial court issued an injunction, but granted a limited stay only to allow the town to perform essential services pending appeal.[2]

SUMMARY OF ARGUMENT

This was a case of statutory construction of the incorporation statute. Petitioners rely on Article I, Sec. 10 of the United States Constitution as the basis for a federal right to form and, thereafter, maintain a town regardless of state law requirements. The Petition should be dismissed for want of jurisdiction. No federal issues were ever raised in the state proceedings by the Petitioners, and Article I, Sec. 10 has no application to a judicial decision.

Additionally, the creation of a political subdivision creates no contract between it or its inhabitants with the state. The Petitioners have no standing to pursue an action based on a nonexistent contract.

The Petition should be dismissed for the further reason that the court ruling impaired no contracts. South Carolina law provides a means of protecting contractual obligations of dissolved public entities, and a plan for winding up the affairs

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1. Record on Appeal, pp. R-287-316; Plaintiff's Exhibits 1, 4, 4A, 5A, 5C, 7, 8, 9, 10, 11, 12, 13 and 20.

2. Record on Appeal, p. R-47.

of the town is underway. Due process does not accord Petitioners a federal right to the continued existence of a political subdivision not created in accordance with law.

Further, the only impairment of contract issue raised in the state courts was the allegation that the Town had "employees under contract".[3] The Petitioners, none of whom were employees, lack standing to raise that issue.

The Petition should also be dismissed because the State of South Carolina has a compelling interest in the formation of its political subdivisions, and its determination that such entities be geographically contiguous does not abridge any federal constitutional provision.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

A. This Court will not review judgments rendered by the highest court of a state, unless a federal issue has been raised and decided in the state proceeding. *Yee v. City of Escondiado,* 503 U.S. 519 (1992). South Carolina law is in accord. Issues not raised and not ruled upon at trial cannot be raised on appeal. *Schofield v. Richland County School District,* 316 S.C. 78, 447 S.E. 2d 189 (1994). The Petitioners' argument that, although not mentioned, federal questions were necessarily decided in the state proceedings is novel, but specious.

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3. Record on Appeal, Answer of Town of James Island, Par. 26, p. R-149; Answer of Election Commissioners, Par. 26, p. R-142.

The Petitioners raised no federal issues in their responsive pleadings or at any time during the state proceedings. Petitioners have not, and cannot, specify any stage of proceedings where federal issues were raised, the method or manner in which they were raised, or the way in which they were passed upon, as required by Sup. Ct. R. 14(g)(i). The Petitioners cannot comply with Sup. Ct. R. 14 for the simple reason that they never presented or argued any federal issues to the state courts. The issue of employees under contract was neither argued to nor passed upon by the state courts.[4]

The Petitioners had ample opportunity to raise and preserve federal issues, if any. The law of South Carolina allows for the liberal amendment of pleadings, and requires such, if the merits of the action will be subserved. Rule 15, SCRCP. State rules of practice further accord a means of preserving issues not ruled upon by the trial court for appellate review. Rule 59(e), SCRCP. Since the Petitioners did not avail themselves of these preogatives during the state proceedings, they cannot do so now.

B. At issue in this case is a judicial interpretation of a statute under which a municipal incorporation was attempted. The South Carolina Supreme Court simply interpreted the law in effect at the time of incorporation. The prohibition of Article I, Sec. 10 of the Constitution is directed to the enactment of laws, not their judicial construction. *Ross v. Oregon*, 227 U.S. 150 (1913).

Contrary to Petitioners' assertion, the decision of the South Carolina Supreme Court imposed no "new" requirement for municipal incorporation under South Carolina law. South Carolina precedent requires a municipality to be geographically contiguous, and this requirement has been implied when not

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4. Counsel for Petitioners were not counsel of record until after the decision of the South Carolina Supreme Court.

expressly stated in a statute. *Tovey v. City of Charleston*, 237 S.C. 475, 117 S.E. 2d 872 (1961). South Carolina precedent also prohibits portions of one municipality being made a part of another, absent adherence to specific statutory procedure. *Town of Forest Acres v. Siegler*, 224 S.C. 166, 77 S.E. 2d 900 (1953).

Petitioners' position that a court must not apply an interpretation of its incorporation statutes to the case at hand, but rather must apply it in the next case, indicates a fundamental misunderstanding of the doctrine of common law.

Even should geographical contiguity be deemed a "new" requirement for municipal incorporation, a change in interpretation of a law by a state court does not constitute the passage of a law in contravention of Article 1, Section 10 of the United States Constitution. *Fleming v. Fleming*, 264 U.S. 29 (1924); *Tidal Oil Company, et al. v. Flanagan*, 263 U.S. 444 (1924).

C. The protection of Article 1, Section 10 of the United States Constitution is for those whose contracts are impaired by legislative action. This case does not involve legislative action. Moreover, Petitioners have no contracts that have been impaired. The creation of a political subdivision, even when lawfully formed, creates no contract between it or its inhabitants and the state. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). Here, the creation of the town was found to have been unlawful, and a nullity. Thus, notwithstanding *Hunter*, there was no "contract" ever in existence. As previously stated, no such issues were presented to the state courts, and Petitioners lack standing to assert them here.

II.

THE RULING OF THE SOUTH CAROLINA SUPREME COURT HAS IMPAIRED NO CONTRACTS NOR VIOLATED ANY PRINCIPLES OF DUE PROCESS.

To the extent the Petitioners attempt to claim the effect of the state court ruling impaired contracts between the town and third parties, this claim must be disregarded. The Petitioners are not parties to any such contracts, and they have no standing to allege a constitutional violation on behalf of a stranger.

The nullification of the town has not resulted in any contracts being impaired. Under South Carolina law, upon dissolution of a public entity, the obligations of that entity become the responsibility of the entity which assumes its assets. *Walker v. Bennett,* 118 S.E. 779 (1923). Further, any such contracts are now in the hands of a receiver acting under authority of a state court, and any constitutional rights of third parties can be asserted in that forum.

Petitioners raise by implication an alleged violation of due process resulting from the court's ruling due to contracts being impaired ". . . which are the direct product of cherished First Amendment voting and speech rights". (Petition, at page 6). This claim is specious. This Court has recognized that municipal incorporation is purely a matter of state concern.

> . . . Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . The number, nature and duration of the powers conferred upon these corporations and the territory over

> which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental power . . . constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold in itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it of another municipality, repeal the charter and destroy the corporation. All of this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the State is supreme, and its legislative body, conforming its action to the state constitution, may do it as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may suffer inconvenience . . . they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers and there is nothing in the Federal Constitution which protects them from these injurious consequences.

Hunter v. Pittsburgh, 207 U.S. 161, at 178, 179.

Petitioners' naked assertion in their Petition, at pages 21 and 22, that "South Carolina having permitted the municipality to elect officers, and thereby to become empowered, the state could not retroactively abridge those rights", flies in the face of *Hunter*.

The State of South Carolina has established requirements for municipal incorporation. Among those requirements is geographical contiguity. The requirement of contiguity does not run afoul of any federal constitutional provision, and Petitioners do not contend that it does. Petitioners are merely frustrated because of their inability to comply with state law, and seek to make a federal case out of a matter purely of state concern.

The Petitioners simply have no federally protected interest in the continuation of the town, and no federally protected interest to assemble, vote or otherwise speak in an illegally formed town.

The cases cited by Petitioners to support their position have no factual or legal bearing here. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), involved the retroactive application of a subsequently enacted law to a preexisting contract. This case does not involve the enactment of a law, or any retroactive application of a law. In this case, the South Carolina courts construed the statutory and common law in effect when the offending conduct was undertaken.

Gomillion v. Lightfoot, 364 U.S. 339 (1960) presented a challenge to a legislative act, not a judicial decision. *Gomillion* held that state laws, even in areas where the state is supreme, must yield to federal constitutional requirements. There is no federally protected right to live in a non-contiguous town, based on Article I, Sec. 10 of the Constitution, or otherwise. Indeed, in *Gomillion*, this Court acknowledged that ". . . no constitutionally protected contractual obligation arises between a state and its governmental entities solely as a result of their relationship". 346 U.S. at 343.

Bouie v. City of Columbia, 378 U.S. 347 (1964) is similarly inapposite. *Bouie* held that an unforeseeable enlargement of a

criminal statute by judicial construction violates the due process clause of the Fourteenth Amendment. This is neither a criminal case, nor a case based on the Fourteenth Amendment. Even if it were, given longstanding state precedent, the Petitioners cannot reasonably claim surprise or an unforeseeable construction of the statute at issue. *Tovey v. City of Charleston, supra.*

III.

THE STATE OF SOUTH CAROLINA HAS A COMPELLING INTEREST IN HOW ITS POLITICAL SUBDIVISIONS ARE FORMED.

It is evident that the State of South Carolina has a singular and compelling interest in establishing public policy for how its political subdivisions are formed. *Hunter v. Pittsburgh, supra.* The federal judiciary has been loathe to interfere with a state in the administration of its own affairs.

The law of South Carolina is that cities must be geographically contiguous. Petitioners raise no federal claims inherent to this requirement; rather, their alleged claims stem solely from their frustration with the fact of this requirement.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

S.C. Code Ann., Sec. 5-1-110 provides, in pertinent part:

> Any suit to challenge the incorporation procedures of any municipality . . . shall be brought within sixty days after the issuance of a certificate of incorporation.

S.C. Code Ann., Sec. 5-15-150 provides, in pertinent part:

> Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election . . .

Rule 15, South Carolina Rules of Civil Procedure provides, in pertinent part:

> (a) . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party . . .
>
> (b) When issues not raised by the pleadings are tried by express or implied consent . . . they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;. . . . If evidence is objected to at the trial on the ground that it

> is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby. . . .

Rule 59(e), South Carolina Rules of Civil Procedure provides:

> (e) A motion to alter or amend the judgment shall be served not later than ten (10) days after receipt of written notice of the entry of the order.